

1 BARRY J. PORTMAN
2 Federal Public Defender
2 JOYCE LEAVITT
3 Assistant Federal Public Defender
3 555 12th Street Suite # 650
4 Oakland, CA 94607-3627
4 Telephone: (510) 637-3500

5 | Counsel for Defendant NELSON

1 UNITED STATES OF AMERICA,)
2 Plaintiff,) No. CR 07-00364 CW
3 v.)
4 MARVIN NELSON,) DEFENDANT'S SENTENCING
5 Defendant.) MEMORANDUM
) Date: July 9, 2008
) Time: 2:30 p.m.
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INTRODUCTION

On December 18, 2007, defendant Marvin Nelson pled guilty to a one count indictment which charges him with a violation of 18 USC §641 - theft of government property. Mr. Nelson will be sentenced by this Court on July 9, 2008. A presentence report (“PSR”) was prepared by United States Probation Officer Christina Carrubba who calculates the advisory guideline range in this case to be 15-21 months. PSR ¶56. She recommends that the Court sentence Mr. Nelson to a below-guideline sentence of five years probation with a condition of probation that Mr. Nelson serve 7 months in community confinement and 8 months in home confinement. PSR, Sentencing Recommendation. Mr. Nelson agrees that a sentence of probation rather than imprisonment is appropriate in this case. However, he asks the Court to consider sentencing Marvin to a term of

1 probation which includes 15 months in home confinement, rather than a split sentence of 7 months
 2 in a half-way house and 8 months in home confinement. Such a sentence is "sufficient, but not
 3 greater than necessary" to address the 18 U.S.C. §3553 factors which would encompass the
 4 extraordinary abuse which Mr. Nelson suffered at the hands of his mentally ill mother, as well as his
 5 own diminished capacity, including severe depression, post-traumatic stress disorder and
 6 intermittent suicidal ideation. Mr. Nelson submits this sentencing memorandum in support of his
 7 request.

8 Attached as exhibits are: (1) medical records from John Peter Smith Hospital in Fort Worth,
 9 Texas dated 1979-80 relating to Betty Nelson (Exhibit A); (2) medical records from Mental Health
 10 Mental Retardation of Tarrant County facility in Fort Worth, Texas dated 1977-81 relating to Betty
 11 Nelson (Exhibit B); (3) medical records from David Louis M.D. in Oakland, California from 2002
 12 relating to Marvin Nelson (Exhibit C) (4) medical records from Berkeley Therapy Institute in
 13 Berkeley, California dated 2005 relating to Marvin Nelson (Exhibit D); (5) medical records from
 14 South County Crisis Center in San Leandro, California dated 2005 relating to Marvin Nelson
 15 (Exhibit E); (6) medical records from Tri-City Health Center in Fremont, California from 2006
 16 relating to Marvin Nelson (Exhibit F); (7) letter dated July 3, 2008 from East Bay Community
 17 Recovery Project (Exhibit G); and (8) letter dated July 2, 2008 from Christopher Bolo (Exhibit H).

18 BACKGROUND

19 A. Offense Conduct

20 Defendant Marvin Nelson committed theft of government property when he received benefit
 21 checks from the United States Railroad Retirement Board which were payable to his mother Betty B.
 22 Nelson and continued to cash them after her death in 1989. Plea Agreement ¶2.

23 B. Personal Background

24 (1) Betty's Mental Illness and Extraordinary Abuse of Marvin

25 Marvin Nelson is a 48 year old white man who was born in Fort Worth, Texas, and raised by
 26 mentally ill parents. *Id.* at ¶¶37, 38. Marvin's father, who was a veteran of the Korean war, often

1 talked to himself as if others were present and was diagnosed with schizophrenia. *Id.* at ¶37. This
 2 information was confirmed by Marvin, and his sister Roxanne Rogers.¹ Marvin's father was mentally
 3 ill but apparently not violent. In contrast, Marvin's mother was both mental ill and extremely violent.

4 Marvin described, and his sister confirmed, a childhood in which Marvin was beaten
 5 regularly. In fact, Betty Nelson freely admitted during one of her many visits to a mental health
 6 hospital that she regularly beat Marvin with a board. *See Exhibit B* at bate BN000039. Furthermore,
 7 Betty Nelson shot at Marvin when he was just eight years old, another fact which is corroborated by
 8 police officers when they interview neighbors in connection with another one of Betty's
 9 commitments to a mental health facility. PSR ¶38; Exhibit A at bate JPS000857. Not only did Betty
 10 beat her son and shoot at him, but she also doused him with lighter fluid and set him on fire when he
 11 was a child. PSR ¶38. Furthermore, Betty would punish Marvin if he did not finish the food on his
 12 plate, by setting it aside for a week or more and then forcing him to eat it only after it became rotten,
 13 moldy and rat-infested. Marvin discussed this during the pre-sentence interview and it was confirmed
 14 by his sister.² PSR ¶38.

15 Betty Nelson was so crazy and violent that she should have been institutionalized on a long
 16 term basis. However, Marvin did not want to see her institutionalized and so he dropped out of high
 17 school at age 16 or 17 years old, to become her primary caretaker. PSR ¶46. Meanwhile, neither
 18 Roxanne, nor any other relatives had a desire to care for Betty, and Marvin was left alone with her.

19 Betty's extreme mental illness is described in the few remaining records. For example,

21 ¹Undersigned counsel spoke with defendant's sister, Roxanne Rogers regarding the family
 22 history and is supplementing this section with information provided by Ms. Rogers. Should the
 23 Court desire, counsel could submit a declaration to confirm that the information being attributed to
 24 Ms. Rogers was provided to undersigned counsel by Ms. Rogers during a telephone conversation on
 25 October 22, 2007.

26 ²Finally, Roxanne also told undersigned counsel that she had also been sexually molested by
 27 both parents when she was 6 or 7 years old, and that she believed that Marvin had been molested as
 28 well. However, when she asked Marvin about it, he told her that things at the house after she moved
 29 out were too awful to describe and he refused to provide details telling her that he thought it would
 30 only make her hate the parents even more.

1 mental health reports from the late 1970's describe Betty Nelson as suffering from schizoaffective
2 disorder with psychosis. Exhibit A at bate JPS 000034. Mental health records describe the fact that
3 the parents "had never gotten along . . . even to the point of shooting at each other." *Id.* at
4 JPS000053. The records further reflect that Betty Nelson prayed that her husband would die and after
5 he did, she began to believe that she had a direct line to God. *Id.* When Betty Nelson was brought
6 back to John Peter Smith mental hospital in Fort Worth Texas, in 1979, there were references to the
7 fact that Betty was "acting the same now as before only much worse" and that her behavior included
8 eating dirt, cutting and burning her hair, burning other objects and stating that god was talking to her
9 *Id.* at JPS JPS000034 and 856. She also believed that her daughter was "Satan's Daughter." Exhibit
10 B at bate BN000005.

11 Betty Nelson's mental illness had a profound affect on Marvin. Marvin spent most of his life
12 until age 29, either being abused by his mother with no escape as a child, or caring for her despite her
13 crazy and violent behavior alone and with no escape as an adult. He suffered greatly as a result.

14 **(2) Marvin's Resulting Depression and Diminished Capacity**

15 Not surprisingly, Marvin himself, suffers from mental illness including recurrent major
16 depression and post-traumatic stress disorder. *See* Exhibits E ("recurring major depression" at bates
17 SC000002 - 3 and ideation of jumping in front of BART at bate SC000005), F (Zoloft and
18 Wellbuterin prescribed for depression at bate TC000020021), and G ("Mr. Nelson has been
19 diagnosed by Dr. Cohn with Recurrent Major Depression and Post Traumatic Stress Disorder"). In
20 2002, Marvin filled out a self-evaluation while seeing Dr. Davis Louis where he described himself as
21 "sad all the time," not "expect[ing] things to work out" for him and blaming himself "for everything
22 bad that happens." Exhibit C at DL000034.

23 In 2005, he was diagnosed with Bi-Polar Disorder and severe depression. PSR ¶43. Again in
24 2006 he was diagnosed with severe depression and as recently as May, 2008, Mr. Nelson has been
25 diagnosed with Recurrent Major Depression and Post Traumatic Stress Disorder at East Bay
26 Community Recovery Project, where he was sent by pretrial services. Exhibit F at bate TC0000020;

1 Exhibit G. The records attached make it clear that Marvin Nelson still suffers the effects of the abuse
2 which he experienced at the hands of his mother (and perhaps father), and his resulting mental health
3 bears that out. Under 18 U.S.C. §3553, this is relevant information for the Court to consider as it
4 decides the appropriate sentence.

DISCUSSION

A Sentence of Probation which Includes Home Detention is Sufficient, But Not Greater Than Necessary, to Satisfy the Goals of Sentencing

The Supreme Court’s decisions in *United States v. Booker*, 543 U.S. 220 (2005), *Kimbrough v. United States*, 128 S.Ct. 558 (2007), and *Gall v. United States*, 128 S.Ct. 586 (2007), have dramatically altered the district court’s role in sentencing. Taken together, the cases make it clear that district court judges now have the ability, as well as the duty, to exercise their judgment and discretion in arriving at a sentence that is “sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2).” Section 3553(a)(2) states that such purposes are:

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2). Moreover, district courts must consider “the nature and circumstances of the offense and the history and characteristics of the defendant,” the kinds of sentences available, the policies of the Sentencing Commission, the guidelines, the need to avoid unwarranted sentence disparities, and the need to provide restitution to any victims. 18 U.S.C. §3553(a)(1) - (7); *see also*, e.g., *United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008) (describing the “overarching statutory charge for a district court”).

25 Of course, even before the Supreme Court's decision in *Booker* rendered the Sentencing
1 Guidelines advisory, district courts had some authority to depart from the Guidelines. *See generally*

1 USSG § 5K (enumerating grounds for departure).

2 In *Booker*, the Supreme Court held that the mandatory nature of the Sentencing Reform Act of
 3 1984 violated the Sixth Amendment right to a jury trial. *See Booker*, 543 U.S. at 264. “To remedy
 4 the constitutional infirmity, the Court severed the mandatory portions of the Act, rendering its
 5 sentencing provisions, including the Sentencing Guidelines, effectively advisory.” *United States v.*
 6 *Ameline*, 409 F.3d 1073, 1074 (9th Cir. 2005) (en banc). The Guidelines, “formerly mandatory, now
 7 serve as one factor among several courts must consider in determining an appropriate sentence.”
 8 *Kimbrough*, 128 S.Ct. at 564. While “district courts still ‘must consult [the] Guidelines and take
 9 them into account when sentencing,’” *United States v. Cantrell*, 433 F.3d 1269, 1279 (9th Cir. 2006)
 10 (quoting *Booker*, 543 U.S. at 264), the district courts “may not presume that the Guidelines range is
 11 reasonable,” *Gall*, 128 S.Ct. at 596-97 (citing *Rita v. United States*, 127 S.Ct. 2456 (2007)). And, as
 12 the Court’s subsequent decisions in *Gall* and *Kimbrough* demonstrate, *Booker*’s consultation
 13 requirement is not intended to limit the district court’s sentencing discretion.

14 The Court in *Gall* emphasized the importance of deferring to the judgment of the sentencing
 15 courts, explaining:

16 The sentencing judge is in a superior position to find facts and judge
 17 their import under § 3553(a) in the individual case. The judge sees and
 18 hears the evidence, makes credibility determinations, has full
 19 knowledge of the facts and gains insights not conveyed by the record.
 20 *Id.* at 597-98 (quoting *Rita v. United States*, 127 S.Ct. 2456, 2469 (2007)).

21 Further, while the Guidelines are to be accorded “respectful[] consideration,” no factor,
 22 including the Guidelines, “should be given more or less weight” than any other factor. *Id.*
 23 Moreover, the sentence must be based on “an individualized determination based on the facts.” *Id.*
 24 The primary directive in §3553(a) is that the Court must impose a sentence that is “sufficient, but not
 25 greater than necessary, to comply with” the purposes of sentencing. *See* 18 U.S.C. §3553(a).

26 In this case, a term of probation with 15 months in home detention is sufficient to meet the
 27 purposes of sentencing. Some of the factors which the Court should consider are discussed below.

1 **1. Nature and Circumstances of the Offense**

2 Under 18 U.S.C. §3553(a), the Court should consider the nature and circumstances of the
3 offense in determining an appropriate sentence. This case involves theft of government funds from
4 the Railroad Retirement Board. The money was intended for Mr. Nelson's mother, Betty, who died
5 in 1989. The offense is primarily one of omission. It is true that Marvin took certain affirmative
6 steps to prevent discovery such as opening a joint bank account, continuing to sign his mother's name
7 to the back of the check as he had done when she was alive, and initially lying to the agents when
8 they first questioned him. However, the offense is a fairly passive crime which did not involve
9 Marvin doing anything to commit the offense other than continuing to spend money which was sent
10 by the federal government for the benefit of his mother.

11 The offense is aggravated by the fact that Marvin did not notify the Railroad Retirement fund
12 and they continued to pay him over 17 years. But this was partly due to the fact that Marvin was
13 afraid of getting in trouble. As a child, if Marvin committed some perceived wrong, the punishment
14 was always extreme (i.e. being beaten with a board, forced to eat rancid food, shot at, or set on fire).
15 Thus, it is understandable that once he recognized that he was not entitled to keep the money, his fear
16 of getting in trouble in this case caused him to let the offense continue without notifying the
17 authorities. On balance, this is not the kind of offense which should lead to a sentence of
18 imprisonment. Rather, probation with restrictions on Mr. Nelson's liberty in the form of home
19 detention is appropriate.

20 **2. The History and Characteristics of Marvin Nelson**

21 Under 18 USC §3553(a), the history and characteristics of Marvin Nelson is a separate factor
22 for the Court to consider in fashioning a fair and just sentence. Even when the guidelines were
23 mandatory, district courts recognized that an individual could be sentenced below the guideline range
24 based upon childhood abuse. *See, e.g. United States v. Walter*, 256 F.3d 891 (9th Cir. 2001)(court
25 departed from 41 months because it determined that childhood abuse constituted the type of
26 extraordinary circumstances justifying consideration); *United States v. Roe*, 976 F.2d 1216 (9th Cir.

1 1992)(court clearly erred in holding it did not have discretion to depart downward where defendant
 2 suffered extraordinary abuse as a child); *United States v. Rivera*, 192 F.3d 81, 84 (2d Cir. 81, 84 (“It
 3 seems beyond question that abuse suffered during childhood - at some level of severity - can impair a
 4 person’s mental and emotional condition”).

5 Furthermore, a defendant also could be sentenced below the guidelines if the individual
 6 suffered from diminished capacity, including depression and post traumatic stress disorder. *See, e.g.*
 7 *United States v. Menyweather*, 431 F.3d 692, 698 (9th Cir. 2005)(in embezzlement case, district court
 8 departed eight levels to probation based in part on post traumatic stress syndrome); *United States v.*
 9 *Cantu*, 12 F.3d 1506, 1512, 1516 (9th Cir. 1993)(criminal justice system long has meted out lower
 10 sentences to persons who although not technically insane are not in full command of their actions.);
 11 *United States v. Lewinson*, 988 F.2d 1005 (9th Cir. 1993)(four level departure where defendant
 12 suffered from depression even though mental disease not severe and did not affect defendant’s ability
 13 to perceive reality); *Caro v. Woodford*, 280 F.3d 1247, 1258 (9th Cir. 2002)(more than any other
 14 singular factor, mental defects have been respected as a reason for leniency).

15 Contrary to the government’s argument in its sentencing memorandum, the Court need not
 16 find that the mitigating circumstances amount to a “departure” before it can sentence Mr. Nelson
 17 below the guideline range. Rather, the Court is to make “an individualized determination based upon
 18 the facts” under the factors set out in 18 U.S.C. §3553. Such a determination is consistent with the
 19 law and justifies a sentence of probation in this case. After *Booker*, 543 U.S. 220 (2005), *Kimbrough*,
 20 128 S.Ct. 558 (2007), and *Gall*, 128 S.Ct. 586 (2007), the guidelines are just a starting point and one
 21 factor to be considered along with many.

22 Here, Marvin Nelson suffered extraordinary abuse, and that abuse has been documented.
 23 Moreover, he suffers from recurrent major depression and other mental health issues which have been
 24 diagnosed by a number of different doctors including Dr. Scott Eliason, who was retained by the
 25 probation officer in this case, as well as Dr. David Cohn, who is affiliated with the pretrial services
 26 officer. *See* PSR ¶44; Exhibit G. The extraordinary abuse and diminished capacity are mitigating

1 factors which the Court should consider. Given all of the circumstances, a sentence of probation with
2 home detention is adequate.

3 **3. A sentence of probation and home detention is sufficient to show respect for the law, just punishment and adequate deterrence and no greater sentence is needed either to protect the public or for training**

4
5 18 U.S.C. §3553 provides that the Court shall consider the need for a sentence to promote
6 respect for the law, provide just punishment for the offense and afford adequate deterrence to
7 criminal conduct. 18 U.S.C. §3553(a)(2)(A) and (B). Furthermore, the Court is required to consider
8 the need to provide a defendant with needed educational or vocational training or other correctional
9 treatment in the most effective manner. 18 U.S.C. §3553(a)(2)(D). All of these factors support a
10 sentence of probation and home detention.

11 Marvin already has respect for the law, as is shown by his many years of primarily law-
12 abiding behavior. A review of his criminal history, with the only criminal history points resulting
13 from an offense which occurred almost 22 years ago, shows that Marvin has respect for the law.

14 In addition, the proposed sentence also provides just punishment as Marvin has been
15 convicted of a felony and, even if he receives a sentence of probation with home detention, his
16 freedom is still being severely restricted. Given his mental status, such a sentence would serve as just
17 punishment. Finally, the proposed sentence also provides adequate deterrence. He is getting the
18 counseling he needs to assure that he will not commit crimes in the future.

19 The probation officer who wrote the PSR recognizes that custody is not warranted and may be
20 detrimental:

21 a sentence with an element of confinement, not involving
22 imprisonment, is a significant form of punishment . . . placing him in
23 prison might cause further harm to the defendant's mental state than
24 necessary.

25 PSR, Sentencing Recommendation. Moreover, Mr. Nelson's current therapist confirms that
26 incarceration would be cause injury to him:

I have no doubt that any length of incarceration would be harmful to
Mr. Nelson's mental health and emotional well-being and I strongly

1 recommend continued mental health treatment.

2 Exhibit G.

3 Given the therapist's comments, it is clear that a sentence of probation and home detention
4 would further the sentencing factor of providing a defendant with any "needed educational,
5 vocational or other correctional treatment" in "the most effective manner." Exhibit G; *See also* 18
6 U.S.C. §3553(a)(2)(D).

7 **4. Most Effective Way to Pay Restitution to Victims**

8 18 U.S.C. §3553(a)(7) provides that the court shall consider the need to provide restitution to
9 any victims of the offense. In this case, Mr. Nelson will better be able to pay restitution to the
10 government if he is allowed to remain out of custody and find a job with the probation office's
11 assistance. Mr. Nelson has already paid \$51,000 towards restitution which represents the money he
12 was able to liquify from a 401K as adjusted because of the down market. He would like to pay off
13 the restitution as quickly as possible and make the victim Railroad Retirement Board whole.
14 Restitution is a factor for the Court to consider under 18 U.S.C. §3553(a)(7). This factor weighs in
15 favor of the sentence requested.

16 **CONCLUSION**

17 For all of the reasons described above, Marvin Nelson respectfully urges the Court to
18 sentence him to a term of five years probation with a condition that he serve 15 months in home
19 detention.

20 Dated: July 7, 2008
21

22 Respectfully submitted,

23 BARRY J. PORTMAN
24 Federal Public Defender

25 /S/
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JOYCE LEAVITT
27 Assistant Federal Public Defender
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